IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1475

UNITED STATES STEEL CORPORATION,
Defendant-Petitioner,

and

UNITED STEELWORKERS OF AMERICA, et al.,
Defendants-Respondents,

v.

JOHN S. FORD, et al.,
Plaintiffs-Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL AND REPLY BRIEF

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SUPPLEMENTAL AND REPLY BRIEF

This supplemental and reply brief is filed (1) to direct the Court's attention to the recent decision of the Fifth Circuit Court of Appeals in *Swint v. Pullman-Standard*, Civ. No. 74-3726 (5th Cir. Aug. 30, 1976); (2) to note the similarities between the issues presented in the instant petition for certiorari and the issues in certain other petitions for certiorari which this Court has recently granted; and (3) to reply briefly to respondents' "Brief in Opposition to Certiorari."

A. **Swint v. Pullman-Standard.**

In its Petition for Certiorari United States Steel Corporation stated as its fourth and fifth questions presented:

> 4. Whether the Fifth Circuit's continued adherence to the 'special circumstances' test in Title VII back pay determinations, comports with this Court's decision in *Albemarle Paper Co. v. Moody*, — U.S. —, 95 S.Ct. 2363 (1975) and with the decisions of other courts of appeals?
>
> 5. Whether a district court may in its equitable discretion consider difficulty of ascertaining a sufficient causal connection between the employer's conduct and alleged damages, and difficulty of ascertaining any amount of back pay lost by a particular claimant as a result of employer conduct, in determining the propriety of an award of back pay under Title VII?

On August 30, 1976 the Fifth Circuit decided *Swint v. Pullman-Standard*, Civ. No. 74-3726. The *Swint* decision is important to the present petition because in *Swint* Judge Clark, writing for the Fifth Circuit, explains that portion of the holding below from which petitioner's issues four and five arise. Judge Clark, who had also been on the panel in *Ford*, said of the Fifth Circuit's *Ford* opinion:

> the [district] judge . . . denied back pay in [*Ford*] because plaintiffs had not proven harm caused by discrimination.
>
> The focus of our appellate reversal . . . [in *Ford*] was the erroneous assignment to plaintiffs of the burden of presenting evidence sufficient to justify a back pay award to the class.
>
> For purposes of back pay relief [*Ford*] holds that economic harm is not required to be shown as an element of a prima facie case unless the defendant has shown "convincingly" by "statistically fair exhibits" that the class earned "at least as much as a plant-seniority comparable group of whites."

The holding by the Fifth Circuit in *Ford*, explained by Judge Clark, conflicts directly with the burden of proof rule stated in *Local 974, United Transportation Union v. Norfolk and Western Ry. Co.*, — F.2d —, —, 11 FEP Cas. 410, 413 (4th Cir. 1975) ("[T]o justify an award [of back pay] plaintiffs must prove that there is a class whose members suffered economic loss as a result of discrimination."); and in principle with the decision of this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case . . .") and the Sixth Circuit's opinion in *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (1974).

The Fifth Circuit has, contrary to established burden of proof rules, eliminated plaintiff's traditional burden of proving some economic loss caused by the alleged unlawful practice as a prerequisite to recovering damages, and cast an impermissible negative burden of proving no economic loss on the defendant. Worse yet, it has held that defendant's misplaced burden can be met only by a showing that "the class earned 'at least as much as a plant-seniority comparable group of whites,' " or, more simply stated, by showing income parity.

Whenever the average income of whites exceeds that of blacks, the Fifth Circuit has mandated an award of back pay and the only questions remaining are *who* is entitled to the back pay and how it is calculated (the Fifth Circuit's so-called "Stage II"). Factors in the social system outside the plant itself are ignored in determining the entitlement of the *class* to back pay, and every case where blacks on the average earn less than whites automatically goes to individual adjudications (Stage II) (in this case some 2700 in number) without reference to whether

income differences may have been caused by nondiscriminatory factors other than race (i.e., in the present case defendant's trial evidence unrefuted on the record explained differences in income by differences in average education, experience, qualifications, and refusals to advance) and without any consideration whether blacks, on the average, would have earned more under the seniority system as ordered modified, which are facts considered irrelevant by the Fifth Circuit at "Stage I." Also ignored by the Fifth Circuit in *Ford* is the trial court's equitable discretion in determining whether an award of back pay is appropriate. *Albemarle Paper Co. v. Moody*, — U.S. —, 95 S.Ct. 2362 (1975). This discretion is constitutionally compelled in this case where a jury trial was requested, but denied based on its existence. *See Curtis v. Loether*, 415 U.S. 189, 196-97 (1974).

A better result, and a result consistent with traditional burden of proof rules, would be to permit a plaintiff to obtain class-wide injunctive relief without proof of economic injury, but to require that a *plaintiff* who also seeks back pay prove, as part of his *back pay case* for the class, that the class he represents has suffered *some economic injury as a result of discrimination*. If this is done, the defendant should be allowed the opportunity to go forward and (1) to rebut the plaintiff's suggestion that a difference in income is the result of discrimination; or (2) show some other reason why, even assuming economic injury as a result of discrimination, back pay is inappropriate under *Albemarle*. The defendant should be permitted this opportunity to rebut or offer some other proper basis for a back pay denial prior to a setting of 2,700 individual adjudications, and the ultimate burden of persuasion should remain with the plaintiffs.

The Fifth Circuit's two-stage procedure, as applied, has destroyed the "class" nature of Title VII class actions and obliterated the *Albemarle* standards. Whether this result is proper under the Civil Rights Act of 1964, *Albemarle* and traditional rules respecting the burden of proof is a question which warrants review by this Court.

B. Petitions for Certiorari Granted.

This Court has recently granted certiorari to review the Fifth Circuit Court of Appeals' decisions in *United States v. T.I.M.E.-DC, Inc.*, 517 F.2d 299 (5th Cir. 1975); *Rodriguez v. East Texas Motor Freight System, Inc.*, 505 F.2d 40 (5th Cir. 1974); and *Castaneda v. Partida*, 524 F.2d 481 (5th Cir. 1975). *T.I.M.E.-DC* and *Rodriguez* involve trucking industry seniority systems alleged to be racially discriminatory, and *Castaneda* involves an allegation of racial discrimination in the selection of a grand jury. The *T.I.M.E.-DC*, *Rodriguez*, and *Castaneda* petitions each present questions similar to certain questions presented in the present petition.

For example, in *Rodriguez*, East Texas Motor Freight has been granted a petition for certiorari to present among other questions the following:

> Whether absent a class action hearing or an equivalent opportunity to present evidence on the question of the appropriateness of the class, the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the plaintiff?

East Texas Motor Freight System, Inc. v. Rodriguez, No. 75-718, Petition at 3. The second question presented in the present petition is similar:

> Whether Federal Rules of Civil Procedure (F.R.C.P.) Rule 23(c)(1) authorizes the substitution of new plaintiff class members and addition of new defendants, where these class alterations are (1) after trial at judgment and (2) without notice or a hearing?

T.I.M.E.-DC will present to this Court, among other questions, to question:

> Are statistics reflecting a present disparity in the proportion of white versus minority incumbent employees "dispositive" in a pattern and practice suit under Section 703 of Title VII of the Civil Rights Act of 1964, where the Court of Appeals has found that the employer has made "a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment"?

T.I.M.E.-DC, Inc. v. United States, No. 75-672, Petition at 2. Question 6 presented by the present petition is:

> Whether a district court may in its equitable discretion consider employer good faith, lack of notice of alleged discrimination, and reliance on the state of the law in determining the propriety of an award of back pay under Title VII?

U. S. Law Week summarizes the questions presented in *Castaneda v. Partida*, No. 75-1552 as:

> Did evidence submitted by petitioner in this case rebut inmate's prima facie case of discrimination in grand jury selection?

and,

> Is court of appeals' decision in this case in conflict with decisions of this Court?

44 U.S.L.W. 3713 (June 15, 1976). These *Castaneda* questions are similar to the present petition's questions 4, 5 and 6.

The ultimate holdings of this Court in *T.I.M.E.-DC, Rodriguez*, and *Castaneda* bear therefore on the proper resolution of several of the issues presented in this case. Were it not for the fact that the present petition presents other important questions not raised in *T.I.M.E.-DC, Rodriquez*, and *Castaneda*,

certiorari could be granted in the present petition and the case simply held pending decision in *T.I.M.E.-DC, Rodriguez*, and *Castaneda*. But the present petition does present important questions which will not be decided by *T.I.M.E.-DC, Rodriguez*, and *Castaneda*. *T.I.M.E.-DC, Rodriguez*, and *Castaneda* will not directly answer the question whether the Fifth Circuit's continued application of a "special circumstances" test is permissible despite *Albemarle*. They will not specifically determine whether a plaintiff in a class action as part of his back pay case must prove some economic loss to the class. They will not decide petitioner's question 1 concerning the standing of a class representative on appeal when he does not appeal for himself, and they will not clarify the application of the *American Pipe* class action tolling rule to Title VII cases. These are important issues warranting review by this Court, and are questions which this Court can conveniently and expeditiously consider while reviewing the procedural questions presented in *T.I.M.E.-DC, Rodriguez*, and *Castadena*.

C. Respondent's Opposing Brief Suggests the Appropriateness of a Writ of Certiorari in This Case.

The importance and substantiality of the questions presented in the petition for certiorari in this case, and the need for review by this Court, are highlighted by the opposing brief, which was only filed by respondent Ford after he was specifically requested to respond by this Court.

Initially, respondent Ford, in his "Brief in Opposition to Certiorari", does not deny that the Fifth Circuit in reversing the District Court applied the "special circumstances" test and totally rejected the District Court's equitable considerations of failure to prove causal connection, employer and union good faith, lack of notice, and reliance on the state of the law. Nevertheless, in attempting to avoid the aforesaid questions 4, 5,

and 6 raised in the petition, Mr. Ford states that "no questions of law are raised by these petitions that was not settled by this Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)." In fact, if *Albemarle* is dispositive of this action, it holds directly contrary to the Fifth Circuit's analysis below, and the Fifth Circuit's conflict with the *Albemarle* decision of this Court is adequate grounds in itself upon which to grant certiorari.

Mr. Ford fictionalizes the facts of this case when he takes the position in his brief that he has always had standing to sue and that *Sosna v. Iowa*, 419 U.S. 393 (1975) is dispositive. In reality, Mr. Ford never represented or had standing to represent the "new" Ford class (pattern or practice group), since he was only a member of a private class of approximately thirty-five individuals. Mr. Ford was awarded back pay by the District Court and did not appeal for himself or any member of his original class. He has no standing to represent others.

Mr. Ford's suggestion that the order dated August 10, 1973, rather than the order dated May 2, 1973, is the "decision on the merits" referred to in Rule 23(c)(1) is frivolous. The May 2 order itself specifically states at paragraph 15 that it is a "final order and judgment" (A.40), and even a cursory examination of the 150 page (with appendices) May 2, 1973, order, as contrasted with the 5 page order of August 10, 1973, reveals that the decision on the merits in this case was the May 2 order and that the order of August 10 was merely a supplemental order dealing with apportionment of certain back pay awards and attorneys' fees. The Fifth Circuit, in the second sentence of its opinion, states: "The proceedings below culminated in a decree, entered May 2, 1973," (A.75).

Additionally, the order of May 2 must be, and the order of August 10 cannot be, the decision on the merits referred to by

Rule 23(c)(1) since only the May 2 decision describes "those whom the court finds to be members of the class" as required by Rule 23(c)(3). Even if "the decision on the merits" had been the August 10 order, which it was not, the amendment to the class on May 2 would still have been after trial and without notice, and would not have comported either with Rule 23(c)(1)'s further requirement that the class be defined "as soon as practicable after commencement of the action" or with due process of law.

Respondent's contention that petitioner's 23(c)(1) issue is premature is similarly unfounded. The Fifth Circuit specifically held the modification of the class in the May 2 decree to be "literally authorized by Rule 23," making the issue ripe for review by this Court. Respondent's further suggestion that petitioner suffered no surprise or prejudice by the substitution of the Ford class without notice after trial so that an appeal could be prosecuted (by officious intermeddler Ford) after the government withdrew its appeal is similarly without merit.

Respondent strains credulity in his attempt to draw distinctions from this Court's decision in *American Pipe v. Utah*, 414 U.S. 539 (1974) which cannot logically be made. Respondent maintains in effect that the filing of a class action no matter how limited in size and scope tolls a statute of limitations on behalf of a universe consisting of all persons who may ever be added as class members (i.e. on behalf of 2,700 employees at 8 plants other than where Mr. Ford worked). Petitioner believes a different result is mandated by *American Pipe*. In any event, the import of *American Pipe* on the case at bar warrants review by this Court.

In light of the misapplication of the burden of proof standard below by the Fifth Circuit and the inability of respondent Ford to meet the issues presented in the petition, review by certiorari is warranted, and in view of the nature of respondent

Ford's reply, petitioner respectfully suggests that a summary reversal may even be in order.

Respectfully submitted,

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